U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: 02/20/99

Case No.: **1998 INA 188**

In the Matter of:

C. J. FERRARI'S RESTAURANT, Employer,

on behalf of

ANDRES HERNANDEZ, Alien.

Certifying Officer: Dolores DeHaan, Region II.
Appearance : M. S. Romero, Esq., of Silver Spring, New York, for the Employer and Alien

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ANDRES HERNANDEZ ("Alien") by C. J. FERRARI'S RESTAURANT ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

An alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa under § 212(a)(5) of the Act, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the Alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the state employment security agency and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

Application. On November 27, 1995, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Cook" in its Restaurant. The position was classified as "Cook" under DOT Occupational Code No. 313.361-014[2]. Employer described the Job Duties as follows:

> Prepare, season and cook a variety of specialty food including seven different types of seafood, pasta, meats, vegetables, sauces, appetizers, desserts, etc. To assist manager in forecasting the

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[2] 313.361-014 **COOK (hotel & rest**.) alternate titles: cook, restaurant prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81 Prepares food and serves restaurant patrons at counters or tables: Takes order from customer and cooks foods requiring short preparation time, according to customer requirements. Completes order from steamtable and serves customer at table or counter. Accepts payment and makes change, or writes charge slip. Carves meats, makes sandwiches, and brews coffee. May clean food preparation equipment and work area. May clean counter or tables. *GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 3 DLU: 81*

food orders maintaining correct food supplies on hand.

AF 41. The Employer's qualifications for the position were completion of grade school and two years of experience in the Job Offered. The hours of this forty hour a week job were from 10:00 AM to 6:00 PM, at a wage of $11.35 per hour with overtime as needed at $17.03 per hour. *Id*.[3] Although five U.S. workers applied for the job, the Employer did not hire any of the candidates. AF 28, 30, 34.

Notice of Findings. On October 30, 1997, the Certifying Officer (CO) issued a Notice of Findings ("NOF") proposing to deny certification. AF 21-27. The CO found that (1) the Employer failed to file a copy of its menu; (2) the Employer failed to comply with 20 CFR §§ 656.20(g) and 656.21(j), as the recruitment report was signed and dated by an employee of the attorney and was on counsel's letterhead. (3) The CO further found that the Employer rejected U. S. workers for reasons that were neither lawful nor job-related, as it failed to contact U. S. workers who applied for the position. The NOF then explained that on July 29, 1996, the state employment security agency ("the state agency") provided the names and addresses of five U. S. workers whom it referred for the position described in Employer's application. On August 28, 1996, Employer's recruitment report advised that one person who did not identify himself had called the Employer as a result of its advertisement, but was not interested in the position. Otherwise, it did not describe its efforts to contact the persons named on the list. As a result, Employer rejected all of the workers referred by the state agency. Because the Employer had the names and addresses of five U. S. workers whom the state agency had referred for the job, its failure to report any efforts to make contact with them by telephone or mail indicated lack of a good faith recruitment effort, and that the Employer had it failed to comply with 20 CFR §§ 656.20(c)(8) and 656.21(b)(6).[4] The NOF then described the evidence that the Employer was required to file in order to rebut all of the NOF findings.

Rebuttal. The Employer's rebuttal was filed on January 7, 1998. AF 07-20. The rebuttal consisted of a letter by the Employer's counsel and other documents that already were in the record or were added to the record pursuant to the NOF. The Employer's new evidence included a copy of its menu and a copy of the recruitment results that was duly signed by the Employer. In addition, the Employer transmitted copies of letters to the applicants dated December 30, 1997, together with the certified receipt for the mailing of each letter. In addition, the Employer indicated that it called these

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[3] The Alien was a National of El Salvador, who was living and working in the U. S. on an EWI visa. Born 1969, he completed primary school in 1986. He worked as a Cook in a seafood restaurant in Maryland from 1992 to 1994 The Duties Performed were not as extensive as the Job Duties in the Job Offered. From the beginning of 1995 to the date of application, the Alien worked for the Employer in the Job Offered for twenty to thirty hours per week.

[4] 20 CFR § 656.21(b)(6) provides that, if U. S. workers applied for the position and were rejected, the Employer is required to document that they were rejected solely for lawful job-related reasons. The regulations further provide at § 656.20(c)(8) that the job opportunity must clearly be open to any qualified U. S. workers. The NOF explained that when the employer has the addresses and telephone numbers of applicants, the employer cannot simply state that he/she was unable to contact the applicant via telephone. An initial attempt at phone contact, and, if unsuccessful, following-up with a certified letter, is a minimally acceptable effort. A failure to contact applicants at all is essentially considered an untimely contact, and such actions indicate lack of a "good faith" recruitment effort. AF 27. As noted above, however, this Employer did not report any attempt to contact the workers referred by the state agency.

workers and left messages on December 19-23, 1997, and on January 3 and 5, 1998.

Final Determination. The CO's Final Determination of February 4, 1998, denied alien labor certification. AF 04-06. The CO reviewed the record, including the Employer's rebuttal response to the NOF findings that it rejected qualified U. S. workers in violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6). As to the first two NOF findings, the CO found that the rebuttal satisfied the requirement that a copy of the menu be filed and that the report of recruitment results be signed by the Employer.

The CO rejected the report of recruitment results, however, noting that the names of the five U. S. workers were turned over to the Employer July 29, 1996, on July 29, 1996, and that the Employer did not attempt to reach them until after it received the NOF. The CO said,

> In your rebuttal the employer has submitted results of recruitment conducted by the employer in December 1997 and January 1998, signed and dated January 7, 1998. The results state that attempts to contact the applicants via telephone were made on December 19-23, 1997, to no avail; therefore, certified letters were mailed January 5, 1998. However, no response was received from any of the applicants.

AF 05-06. Explaining that the Employer's attempt to contact the U. S. workers occurred long after they were referred by the state agency, the rebuttal established that the efforts were untimely and failed to cure the defect noted in the NOF. The Employer's actions were viewed as an untimely contact that caused the workers to be rejected for this job opportunity.
Accordingly, certification was denied.

Appeal. By its letter of March 6, 1998, the Employer appealed to BALCA. AF 01-03. At this time the Employer asserted that it had made telephone calls to the workers during the recruitment period without success. AF 01. It further argued that it had made calls to the state agency, but had received no guidance as to the correct way in which to proceed in the recruiting process. Counsel then described its recruitment activities subsequent to the NOF, and faulted the state agency for not notifying him or his client of the defect in the recruitment report in time permit it to cure this oversight before referral to the DOL Regional Office.

Discussion

Burden of proof. As the CO's denial of alien labor certification was based on the Employer's failure to sustain its burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of

> proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... .[5]

Moreover, since the Employer applied for alien labor certification under this exception to the broad limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

Issue. As an employer must sustain the burden of proof as to all issues arising in the application, to establish entitlement to certification under the Act, the Employer in this case was required to show that its response to the referral of workers for this position was consistent with the requirement that it acted in good faith in the recruitment process. As a consequence, the issue referred to BALCA is whether the evidence of record supported the CO's finding that the Employer failed to sustain its burden of proving that it made a sufficient effort to contact the U. S. workers whom the state employment security agency referred for the Job Offered.

Analysis and Conclusion. The CO's finding that the Employer violated 20 CFR §§ 656.20(c)(8) and 656.21(b)(6) was based on its rejection of all of the U. S. workers that the state agency referred because they did not contact the Employer. *Supra*. First, the Employer's rebuttal admitted that its first attempt to contact the U. S. workers did not occur until after the NOF was filed. The contradicting assertion at AF 01 in the Appeal that the Employer telephoned these workers before the NOF was issued is given no weight, as this evidence was not filed until after the Final Determination was issued. **Galletti Brothers Food**, 90 INA 511 to 90 INA 516, 90 INA 531 to 90 INA 566 (Apr. 30, 1991); also see 20 CFR §§ 656.26(b)(4) and (c)(6), and 656.27(c). Second, in its rebuttal and in its appeal, moreover, Employer admitted that the state agency referral letter contained the names, addresses, and telephone numbers of all five U. S. workers referred, and that it did not attempt to contact any of the job candidates submitted by the state agency until after it received the NOF. **Norwins Corp.**, 90 INA 246 (Sep. 19, 1991), and see **Flamingo Electroplating, Inc.**, 90 INA 495 (Dec. 23, 1991).

The Employer's explanation in its Appeal and in its Appellate Brief is that the state agency failed to instruct it adequately. This excuse is rejected because the record suggests that the Employer waited for the state agency to provide detailed instructions as to problems it regarded as peculiar to its own circumstances, instead of inquiring as to the proper procedure to follow. **Loma Linda Foods, Inc.**, 89 INA 289 (Nov. 26, 1991)(*en banc*). As a result, the Panel infers that there is no fact for it to find, and the the Final Determination denying alien labor certification was based on the undisputed evidence of record.

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[5] The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

Permission to conduct a new recruitment process after issuance of the NOF was not an option extended to this Employer. Consequently, the Panel finds that the CO correctly rejected the evidence that the Employer belatedly sent certified letters and made telephone calls after it received the NOF many months subsequent to the end of the recruitment period. Because the Employer admitted in its that it failed to contact the U. S. workers who were were referred by the state agency, the CO correctly concluded that the Employer's own actions were the cause of its rejection of the U. S. job applicants when alien labor certification was denied. The issue referred was whether Employer's post NOF recruitment effort may be recognized as an adequate and appropriate response to the NOF. On the other hand, the Employer clearly must bear the burden of providing evidence that the applicants referred by the state agency are (1) not able to perform the job duties; (2) not willing to accept the job; (3) not qualified for the job opportunity; and/or (4) not available for the job opportunity. Where, as in this case, an employer has failed to get in touch with a U. S. worker regarding the job opportunity, and the employer gives this as its reason rejecting that worker, the employer can offer no credible proof that the workers referred by the state agency failed to contact it regarding the job. In addition, by failing to contact or to attempt to contact the U. S. workers by telephone and developing tangible evidence of that effort, and by failing to send certified follow-up letters where necessary, the employer has no evidence to support its contention that it made a good-faith effort to contact and to consider all of the U. S. workers referred by the state agency. In such a case the employer cannot meet the burden of proving that the U. S. workers referred by the state agency were not able, willing, qualified or available for the job opportunity.

The Panel agrees with the CO's construction of the record presented in this appeal from the denial of alien labor certification for these reasons. The regulations at 20 CFR, Part 656 are designed to implement the intent of Congress that a *bona fide* recruitment effort be made as a condition on which the grant of certification is expressly conditioned in every case. 20 CFR § 656.21(b) graphically describes the exhaustive and diligent effort employers are expected to expend in recruiting U. S. workers for the Job Opportunity under the Act and regulations. Employer's does not sustain its burden of proving that it complied with this regulation, as it did not attempt to contact the five U. S. workers referred by the state agency until after the NOF denied certification and its efforts after the NOF was issued were too late to be regarded as part of the recruiting process. The principle is well-established under **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988), that the presumption that the employer is required to recruit in good faith is implicit in the procedural and substantive regulations governing alien labor certification. **Spellman High Voltage Electronic Corp.**, 93 INA 273 (Jun. 27, 1994). The Employer's failure to establish that it made a diligent effort to contact these applicants is a material defect in the recruitment process. **Gorchev & Gorchev Graphic Design**, 89 INA 118 (Nov. 29, 1990)(*en banc*); **The First Boston Corp.**, 90 INA 059 (Jun. 28, 1991).

As its failure to contact job applicants is considered to be "an untimely contact," the Employer's total failure to attempt to reach the five U. S. workers referred by the state agency before the filing of the NOF clearly indicated the lack of a good faith recruitment effort during the recruitment period. (1) The Employer failed to establish that it made a good faith effort to contact these workers, and (2) it rejected them for the sole reason that they did not contact the Employer in violation of 20 CFR § 656.21(b)(6). Because the Employer's conduct supported the inference that Employer failed to recruit in good faith, it further indicated that this job opportunity was not open to any qualified U. S. worker under 20 CFR § 656.20(c)(8).

As the CO's denial of certification is affirmed for the reasons discussed above, the following order will enter.

Order

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1998 INA 188
C. J. FERRARI'S RESTAURANT, Employer,
ANDRES HERNANDEZ, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner
Date: November 30, 1998